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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

ALLEN BRADLEY COMPANY, ALLIS-CHALMERS MANUFACTURING COMPANY, CLARK CONTROLLER COMPANY, COLT'S PATENT FIRE ARMS MANUFACTURING COMPANY, CUTLER-HAMMER, INC., THE ELECTRIC CONTROLLER & MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, MONITOR CONTROLLER COMPANY, SQUARE D COMPANY, TRUMBULL ELECTRIC MANUFACTURING COMPANY and WESTINGHOUSE ELECTRIC & MANUFACTURING COMPANY,

Petitioners,

against

LOCAL UNION No. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, BERT KIRKMAN, individually and as President thereof, WILLIAM BECK, individually and as Treasurer thereof, HUGH MORGAN, individually and as Assistant Business Manager thereof, GEORGE W. WHITFORD, individually and as Recording Secretary thereof, JACOB S. SOLOMON, individually and as Business Agent thereof, and GERALD DUFFY, individually and as an Agent thereof,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

The Circuit Court of Appeals, in respondents' view of the case, rested its determination largely on questions of fact. The Supreme Court had in its most recent decisions, to which some reference is made below, given a clear construction of the intent of the Sherman, Clayton and Norris LaGuardia Acts, so far as they affected a workman's right

to refuse to work either singly or jointly in association with his fellow workers. The Circuit Court of Appeals, accordingly, applied the law, and made no new interpretations thereof or departures from the recent decisions of this Court.

"These cases," the Circuit Court of Appeals wrote (Opinion, p. 319), "as well as earlier ones are too closely similar to the case at bar, indeed, going beyond it in some aspects, to permit the broad adjudication of illegality here and the injunction based on it to stand."

The findings of fact were 374 in number. In view of the fact that the declaration of the District Court was one of illegality, adverse to the respondents, it is not surprising that an occasional finding of fact lifted out of its context and read without reference to what has gone before seems to possess a substantiality which is largely dissipated the moment such finding is restored to its context and evaluated in light of all the findings.

What petitioners sought, but failed to establish as matter of fact, was a partnership between the Union and the Employer of the Union's members to engage in *commercial* monopolistic practices on an ordinary business basis of sharing profits flowing from prices artificially enhanced from the closing of a market to the competition of outsiders. The Special Master, the District Judge and the Circuit Court of Appeals all agreed—and the Union does not dispute—that the *effect* of its labor agreements with the Employers of its members, procured through Union activity and pressure, was in a measure to increase prices and make it difficult for manufacturers not employing members of the Union to market their products within the New York Metropolitan Area in which the Union has jurisdiction. Such effect is often found to result from successful Union activity. But the effect is not to be stigmatized as illegal unless the *cause* is illegal.

An identical effect can be achieved in different ways—some lawful, some forbidden. An agreement among manu-

facturers to freeze out competition and thereby to increase their profits is definitely in violation of law. An agreement between a labor Union and its Employers for a closed shop and for the affixing of Union labels on products—an agreement which provides that the Union members will install only those products manufactured by other members of their Union—may produce the same effect on prices as the monopolistic agreement among the manufacturers, but in balancing the evils of higher prices against lower wages Congress has concluded that public policy requires a concession to labor of the legality of its agreements in this regard.

The Circuit Court of Appeals in appraising the factual situation considered not random findings, but "the general import of all findings" in addition to several explicit findings, holding that, "on any judicious view of the case, we do not believe the motive or intent of defendants can be at all in doubt; * * *" (Opinion, p. 315).

The charge that the Union and its Employers had conspired to do things forbidden by law was rejected by the Circuit Court of Appeals, which summarized the activities of the Union in a single sentence (Opinion, p. 315): "In other words it was a make work campaign for the benefit of union members."

The facts need be touched on only briefly.

When the depression was at its depth and three-quarters of the Union's membership were out of work, the petitioner manufacturers were aggravating Union unemployment in two ways.

In the first place, only three of the petitioners had plants within the Metropolitan Area and vicinity. All three resisted the organizational efforts of the Union, and in fact, one of them removed from the territory (findings of fact 18, 23, 24, pp. 179, 180; findings of fact 55-59, pp. 187-188; findings of fact 81, 82, p. 193). The Circuit Court of Appeals itself noted (Opinion, p. 308) that of the eleven plaintiffs in the action only "*several* operate under collective bargaining agreements with local unions in their localities."

In the second place, the petitioners reduced the available opportunities for the work of installing electrical apparatus within such Metropolitan Area by extensive increased prefabrication of the equipment. To combat this encroachment upon its work opportunities, the Union undertook to unionize those factories which it could reach, namely, those within the Metropolitan Area. Such unionization provided additional job opportunities for the Union's members and enabled it, moreover, to regulate the extent to which factories could encroach upon the job opportunities of those other members who were engaged in the actual installation of the equipment. The Union instructed the latter class of its members not to install any equipment which the factory-hand members had not worked upon (Opinion, pp. 308-311; findings of fact, 231-243, pp. 240-244; finding 246, p. 245; findings 252-256, pp. 246-248; findings 258, 259, p. 249; findings 267-283, pp. 252-257; findings 285-291, pp. 257-260; findings 294, 295, 297, 299, pp. 261-262; findings 308-312, pp. 265-266; findings 315-320, pp. 267-268; finding 321, p. 268; findings 324-326, pp. 269-270; finding 329, pp. 270, 271; findings 339, 340, p. 274; finding 342, p. 275).

The Union has a large membership in the Metropolitan Area. That membership is well disciplined. The campaign of unionization was successful, and contractors and manufacturers, both singly and in groups, yielded to the pressure of the Union and entered into closed shop and labeling agreements with it. The Union benefited. Job opportunities increased. Wages were increased. Hours were shortened (Opinion, pp. 308-311, finding of fact 89, p. 196; findings 93, 94, 95, pp. 197, 198; findings 118-124, pp. 203-205; findings 127-131, pp. 206-207; findings 168-177, pp. 217-221; finding 186, pp. 224, 225; finding 217, pp. 235-236; finding 235, pp. 241-242; findings 238, 239, pp. 242-243; finding 256, p. 248).

The petitioners felt the shoe pinch. For if the Union membership refused to install their equipment as not having been made by their fellow members, the public, consist-

ing of architects, builders, engineers and municipalities, as well as the contractors who employed the members engaged in the installation, would not buy from the petitioners.

Note, please, that of this group only the contractors had agreements with the Union. The others, comprising the "general public", although not alleged to be "confederates" of the Local Union, similarly, refused to buy from the petitioners. This gives point to the Circuit Court of Appeals, analysis of the situation, as follows (Opinion, p. 321):

> "It seems clear, therefore, that the union members may refuse to work upon the plaintiffs' products; and, in view of the position of economic power which the union has now attained, that privilege is for practical purposes an almost complete shield for the defendants' acts which are most injurious to the plaintiffs. For all the other acts charged against the defendants may be barred; and yet if the union can hold its ranks together and keep its members from working upon plaintiffs' products, the Metropolitan Area will still be closed to them."

Shifting Factual Picture as Presented by Petitioners

In its appraisal of the facts the Circuit Court of Appeals took note of petitioners' significant shift in factual emphasis to enable it to make a case "because of the complete reversal of the controlling judicial precedents during the long pendency of this litigation" (Opinion, p. 313). In the original complaint there had been no claim of conspiracy between the Union and the Employer groups to monopolize trade and to increase prices. Rather, is there "stress on union power which has forced the contractors to employ only union labor" and coercion upon the contractors "not to purchase electrical equipment wired or assembled wholly or partly by non-union men outside the Metropolitan Area" (Opinion, pp. 313, 314) (Vid. par. 10 of original complaint, pp. 13-15).

Had petitioners proceeded under their original complaint and proved every allegation thereof, they would, nevertheless, have only proved themselves out of court. To meet the "reversal of judicial precedents" the petitioners in 1937 served an expanded amended complaint, which now charged that the Union had made "contracts with the electrical contractors who, however, were said 'to have been and now are, forced, compelled and coerced by Local 3 to enter into' these contracts for the conduct of their business in the Metropolitan Area and restricting their choice as to the manufacturers from whom they would make their purchases of electrical equipment. And the requested form of injunction remained as in the [original] complaint" (Opinion, p. 314).

The Circuit Court of Appeals noted further that, "The master's opinion stressed the union's economic power" (Opinion, p. 314), rather than an illegal monopolistic agreement between Employers and the Union, and it was only "The voluminous findings filed in 1942 [which] make much more of the conspiracy, or conspiracies; and several conclusory findings allege an intent to give the local manufacturers and contractors power to control the market and the market price".

The injunction as granted follows with only minor changes in wording "the original eight subparagraphs as prayed for in the [original] complaint, and merely adds two more: a 9th against making, carrying out, or seeking to secure the observance 'of agreements or understandings with contractors, manufacturers, or others, restraining, hindering or preventing' the purchase or use of plaintiffs' electrical equipment on the ground that it was not made in New York City or worked on by members of Local 3 or was in competition with equipment made by manufacturers employing members of Local 3" (Opinion, pp. 314, 315; final decree and declaratory judgment, p. 293).

It is fairly to be inferred that the Circuit Court of Appeals in appraising the facts had in mind that the change

of emphasis by the petitioners did not represent a change in factual background but, rather, an effort on the part of the petitioners to fit the facts into the different pattern required by the change in legal precedent.

Legal Precedents, Recent and Remote

The Union's conduct has been predicated on the assumption that Congress by legislative enactment, and this Court by its most recent interpretation thereof, have marked the bounds of lawful Union activity as indicated in the following situations:

(1) A workman, whether as an individual, or jointly with his fellow workmen, has a right to refuse to work if he deems such refusal to be in his economic interest.

The Norris-LaGuardia Act, Section 104(a) proclaims this in letters a foot high: "No Court of the United States shall have jurisdiction" to restrain persons protected by that Act from "ceasing or refusing to perform any work or to remain in any relation of employment", and this Court has held that the equity jurisdiction of the courts was to be limited according to the manifest congressional intent and in accordance with "the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict".

Milk Wagon Drivers' Union, Local No. 753 et al. v. *Lake Valley Farm Products, Inc., et al.*, 311 U. S. 91, pp. 101, 102;
United States v. *Hutcheson*, 312 U. S. 219, pp. 235, 236.

(2) The wisdom or unwisdom of the workman's refusal to work does not affect his right to refuse.

The general rule is stated in *United States* v. *Hutcheson*, *supra*, p. 232. Illustrative of what might seem unwise conduct on the part of workers are the following cases: the *Hod Carriers* case, cited as *United States* v. *Carrozzo*,

37 Fed. Supp. 191, aff'd, per curiam, sub. nom, *United States* v. *International Hod Carriers,* 313 U. S. 539, in which the Union sought to thrust a spoke in the wheel of progress by preventing the use of labor-saving truck mixers; and *United States* v. *American Federation of Musicians,* 47 Fed. Supp. 304, aff'd, per curiam, 318 U. S. 741, in which the Musicians' Union was bent upon eliminating cheap "canned" music from the national market so that "live musicians" could have additional jobs.

(3) The fact that a Union, making agreements for the benefit of its own members, does not concern itself about benefiting the competitors of its members' employers, and does not or cannot enter into similar agreements with such competitors, in nowise affects the legality of such agreements.

In *United States* v. *American Federation of Musicians, supra,* the ultimate goal of the Union was to enter into agreements with the broadcasting studios, which would have the effect of putting the manufacturers of canned music out of business and depriving their employees of employment. The strength of the Musicians' Union was nation-wide and in consequence the effect of their projected agreements with the studios would be equally broad.

In *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552, the white employees were the ones who found themselves caught between the upper and the nether millstones of the labor conflict. If the Alliance prevailed, the white employees were out of a job, because, being white, they could in no view of the Alliance's plan receive the benefit of the campaign, which was to gain employment for negroes.

In *Milk Wagon Drivers' Union, Local No. 753, et al.* v. *Lake Valley Farm Products, Inc., et al., supra,* the drivers, members of the defendant Union, wanted for themselves

the maximum amount of employment in delivering milk from door to door to householders, and would, if they could, have put the retail stores, which sold milk to these householders over the counter, out of business so far as such sales were concerned.

In each instance, as in the present case, the success of the Union in achieving its economic purpose in the struggle with the immediate employers of its members, brought or threatened to bring economic misfortune to employers or employees who were, in effect, third parties to the controversy, and who could in nowise participate in the benefits, if any, accruing to the parties to such controversy from the agreement ultimately entered into between them.

(4) The agreement which a Union compels or persuades an employer or group of employers to enter into does not constitute a "combination with a non-labor group", so as to place such agreement within the ban of the Sherman and Clayton Acts.

We are constrained to ask, how else can a union successfully terminate a labor controversy with an employer than by entering into an agreement with the employer embodying the provisions under which they are thereafter to maintain their relations so long as the "armistice" (Opinion, p. 319) continues between them? Clearly, the making of such agreement does not constitute the parties thereto an unlawful combination, if the agreement originates in a labor controversy.

The citation of *United States* v. *Brims*, 272 U. S. 549, as a footnote to the statement in the opinion in the case of *United States* v. *Hutcheson, supra*, that "so long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under Section 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means", is not authority for the proposi-

tion that a union closed shop and labeling agreement with an employer may be enjoined because the making of such agreement constitutes the parties thereto a forbidden combination. The Circuit Court of Appeals pointed out (Opinion, p. 323) that "the excepting sentence doubtless should not be read with exacting literalness; but in view of the use which has been made of it, we should note that it is not a positive affirmation, but a statement of only restricted reach".

To put it more simply, it would seem that the opinion in the *Hutcheson* case never intended to imply that an agreement concluding, for a limited time, an employer-union controversy would constitute the parties thereto co-conspirators, subject to the penalties of the Sherman and Clayton Acts. The *Brims* case, so far as the statement in question is concerned, is still the law, and the Circuit Court of Appeals does not hold otherwise, writing (Opinion, p. 323), "it is not that combinations with non-labor groups are taboo, but only that when a union no longer acts in its self-interest and does so combine, then the licit and the illicit may have to be determined by a judgment as to the rightness or wrongness, etc., of the union end or purpose."

The *Brims* case, obviously, is no longer good authority for any principles enunciated in *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, and *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Association*, 274 U. S. 37, in view of the fact that these cases were expressly overruled in *United States* v. *Hutcheson, supra*, wherein this Court said (p. 236):

> "There is no profit in discussing those cases under the Clayton Act which were decided before the courts were furnished the light shed by the Norris-LaGuardia Act on the nature of the industrial conflict."

The Determination Herein Made by the Circuit Court of Appeals Is Not in Conflict With the Decision Made by the Circuit Court in the Ninth Circuit in *Lumber Products Association* v. *United States*, 144 Fed. (2d) 546

If, as we have sought to demonstrate, the interpretation of the Sherman, Clayton and Norris-LaGuardia Acts, so far as they are here relevant, has been made clear and definitive in the recent decisions of this Court, it should be apparent that any seeming conflict between the decisions in the two Circuit Courts is as to matters of *fact* and the application of the settled law to the facts, rather than a conflict as to what the *law* is.

Without a careful examination of the record in the *Lumber Products Association* case, one is unable to determine whether error in the application of the law to the facts has been made therein by the Trial and Appellate Courts. The fundamental issue in cases of the type here presented is a factual one, and the trier, whether a court alone, or a court and jury, must determine that issue in order to permit of a proper application of the accepted principles of law. The issue, as we see it, is whether the Union, in making the challenged agreements with the Employer, was acting in its self-interest, as a labor union, that is, fundamentally and primarily for the benefit of its members, or whether its self-interest was a mere sham and pretence to mask a purely business and profit-sharing arrangement with a non-labor group.

The Circuit Court of Appeals, in the instant case, has held that the facts found justify a conclusion that the respondent was acting in its self-interest as a labor union and, hence, its agreement with the Employer group was not a "combination". The jury in the *Lumber Products Association* case, by its verdict, has found as a fact that the primary object of the arrangement between the parties to the agreement submitted to them for consideration was

a commercial one. Hence, such arrangement did in fact constitute a combination. Whether such latter finding of fact was right or wrong, no conflict of legal interpretation is presented.

Conclusion

It is respectfully submitted that the petition for a writ of certiorari in all respects should be denied.

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